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No. 85-1960

In the Supreme Court of the United States

OCTOBER TERM, 1986

ALBERT D. DURDEN, PETITIONER

v.

OFFICE OF PERSONNEL MANAGEMENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioner contends that the Merit Systems Protection Board (MSPB) erroneously determined that he was no longer entitled to civil service disability benefits.

1. In 1978, the Office of Personnel Management (OPM) granted petitioner, a former aircraft mechanic employed at McClellan Air Force Base in California, civil service disability retirement benefits (Pet. App. 16).[1] Upon reexamining petitioner in 1983, OPM found, however, that he was no longer disabled and, accordingly, terminated those benefits (*id.* at 43-49). OPM upheld its decision upon reconsideration (*id.* at 50-55) and the MSPB affirmed (*id.* at 15-42). The MSPB presiding official found that petitioner had

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[1]References to the appendix to the petition for a writ of certiorari, which was not paginated, are based on our consecutive numbering of the pages.

failed to prove by a preponderance of the evidence that he was unable to render useful and efficient service either in his last position (the disability standard in effect when OPM initially found that petitioner was disabled) or in any other position for which the employing agency found him qualified (the disability standard in effect when OPM found that petitioner was no longer disabled). *Id.* at 39-40. The MSPB subsequently declined petitioner's request that it review the presiding official's decision (*id.* at 11-14). The MSPB noted that because petitioner had not shown that he was unable to render useful and efficient service in his last position as an aircraft mechanic, the MSPB did not need to consider whether "the presiding official erred in requiring [petitioner] to show that he cannot perform in any other position" (*id.* at 12 n.*).

The court of appeals affirmed (Pet. App. 1-2, 8-10). The court stressed that petitioner sought, in effect, a reweighing of the medical evidence, which was "clearly beyond [the applicable] scope of [judicial] review" (*id.* at 9, citing 5 U.S.C. 8347(c); *Lindahl* v. *OPM*, No. 83-5954 (Mar. 20, 1985)). The court also noted that because petitioner could not qualify for benefits under either disability standard, the court did not need to determine whether the current or the former disability standard should apply (Pet. App. 9).

2. The decision of the court of appeals is correct and presents no conflict with any decision of this Court. Further review is not warranted.

Petitioner contends (Pet. 24-31) that the MSPB's determination suffers from procedural errors going to the heart of the administrative process and, therefore, is subject to judicial review pursuant to this Court's decision in *Lindahl*. Petitioner's objections, however, are entirely factbound, concerning only the weight given by the MSPB to various medical reports on petitioner's ability, and present no such

fundamental procedural errors. Petitioner's complaint is that the MSPB's disability determination was based upon an invalid and unreliable medical report and perjured testimony and is contrary to three valid medical reports. The court of appeals' conclusion that it lacked authority to review these issues is entirely consistent with this Court's decision in *Lindahl* that Congress intended to preclude judicial review of "the factual underpinnings of [the MSPB's] disability determinations" (slip op. 21). See also *McEachern* v. *OPM*, 776 F.2d 1539, 1545 (Fed. Cir. 1985) (court cannot substitute its judgment on medical evidence for the determination made by the MSPB). In any event, such factual disputes are plainly best resolved by the administrative entity that hears the evidence in the first instance (cf. *Anderson* v. *City of Bessemer City*, No. 83-1623 (Mar. 19, 1985), slip op. 8-10; *Wainwright* v. *Witt*, No. 83-1427 (Jan. 21, 1985), slip op. 21-22), and their resolution in a particular case presents no important legal issue warranting this Court's review.

Petitioner also maintains (Pet. 34-42) that the court of appeals erred in finding it unnecessary to decide which of two possible disability standards applied in this case: the determination of disability under current law or the definition in force at the time of OPM's initial disability determination. Under current law, an employee must prove that he is unable to perform the duties both of the position last occupied and of other positions for which the agency determines the employee is qualified (5 U.S.C. (& Supp. II) 8337(a)). When OPM initially determined that petitioner was disabled, the applicable standard required proof only of the employee's inability to perform the duties of the position last occupied. See *Cerrano* v. *Fleishman*, 339 F.2d 929, 931 (2d Cir. 1964), cert. denied, 382 U.S. 855 (1965).

Petitioner cannot, however, complain of unfair treatment on the ground that the current standard is more restrictive. Although the MSPB presiding official applied

the current standard in this case (Pet. App. 40), the MSPB concluded that it was not necessary to decide which definition applied to petitioner because he did not meet either standard (*id.* at 12 n.*). For this reason, the MSPB concluded, even if the presiding official applied the incorrect standard, any error was harmless. The court of appeals expressly approved the MSPB's conclusion on this basis (*id.* at 9).

Finally, petitioner contends (Pet. 12-13) that he was denied benefits based on accusations that he committed criminal acts and that he is entitled to know both the identity of his accuser and the charges against him. These contentions are without merit. OPM denied petitioner benefits based on the medical evidence and other evidence set out in the record. No criminal proceedings are involved in this purely administrative matter.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

JULY 1986